

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH DECEMBER 2007 / 15TH AGRAHAYANA 1929

SA.No. 929 of 1994(B) & CROSS APPEAL

AS.12/1992 of SUB COURT, MUVATTUPUZHA
OS.201/1988 of MUNSIF COURT,MUVATTUPUZHA
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APPELLANT/PLAINTIFF/PLAINTIFF/ADDL.APPELLANTS 2 TO 5:

1. THOMAS, S/O. OUSEPH, AMBAZHACHALIL, RESIDING AT
THOONUPPUMMUKALAL, KOZHIPILLY KARA, VARAPETTY VILLAGE (*DIED*)

ADDL.APPELLANTS 2 TO 5:

2. JOSE THOMAS, AGED 49,
S/O. LATE THOMAS, AMBAZHACHALIL, RESIDING AT
THOONUPPUMMUKALAL, KOZHIPILLY KARA, VARAPETTY VILLAGE
3. SHAJI THOMAS, AGED 56,
S/O. LATE THOMAS, AMBAZHACHALIL, RESIDING AT
THOONUPPUMMUKALAL, KOZHIPILLY KARA, VARAPETTY VILLAGE
4. SABY SAJU,
W/O.SAJU, AGED 40,
D/O. LATE THOMAS, AMBAZHACHALIL, NOW RESIDING AT
PERINGATTU HOUSE, KILIKULAM POST,
AIRAPURAM, PERUMBAVOOR.
5. SHIBY JOLLY,
W/O.JOLLY, AGED 38,
SON OF LATE THOMAS, AMBAZHACHALIL, NOW RESIDING AT
THUDUMAL HOUSE, PINDIMANA P.O.,
CHEMMIMKITHU, KOTHAMANGALAM.

*(THE LEGAL HEIRS OF THE DECEASED SOLE APPELLANT ARE IMPEADED AS ADDL.
APPELLANTS 2 TO 5 AS PER ORDER DATED 13.6.2017 IN I.A.2315/2009)*

BY ADV. SRI.K.V.JAYACHANDRAN

RESPONDENT/RESPONDENT/DEFENDANT:

GEORGE, S/O. OUSEPH, AMBAZHACHALIL,
RESIDING AT THOONUPPUMKALEL, KOZHIPPILLY KARA,
VARAPETTY VILLAGE.

BY ADV SHRI. M.P. KRISHNAN NAIR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 6/12/07, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

uj.

J U D G M E N T

Plaintiff in O.S.201/ 1988 on the file of Munsiff court, Muvattupuzha is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for recovery of possession on the strength of title. Appellant and respondent are brothers. Appellant is the elder brother. Plaint schedule properties are three items of properties which originally admittedly belonged to the father of appellant and respondent. It was admittedly divided under Ext.A1 partition deed dated 12/1/1977. Under the said partition deed A schedule properties therein were allotted to the share of appellant and B schedule to the share of respondent. Appellant claimed title to plaint schedule property contending that they are properties allotted to him as item Nos.2 and 3 of plaint A schedule property. Adjoining property allotted to the respondent is item No.2 of plaint B schedule property. Appellant would contend that

respondent trespassed into the plaint schedule property and reduced it into his unlawful possession and he is entitled to recover possession of the same with mesne profits on the strength of the title. Respondent resisted the suit admitting Ext.A1 but contending that properties were in the possession of the respective parties even before partition. It was also contended that there was a mistake in the extent and survey number in Ext.A1 partition deed and appellant attempted to trespass into the property and respondent therefore instituted O.S.135/1986 and just prior to the institution of that suit respondent came to know that he obtained 30 cents in R.S.No.68/11A instead of 15 cents and 57 cents instead of 37 cents in R.S.No.68/11C and also 8 cents in survey No.184/1/31/46 instead of 19 cents shown in partition deed and appellant is not entitled to the recovery of possession of the said property as he has no title to the property.

2. Learned Munsiff on the evidence of PW1, Dws.1

and 2 and Exts.A1 to A6, B1 to B3 and C1 and C1(a) found that under Ext.A1 partition deed appellant has title to plaint A schedule property and plaint schedule properties are the properties allotted under A schedule of Ext.A1 and it does not form part of B schedule property allotted to respondent under Ext.A1 and therefore appellant is entitled to the recovery of possession of the same on the strength of title. Learned Munsiff also found that properties were correctly demarcated in Ext.C1(a) plan and appellant is also entitled to mesne profits at the rate of Rs.120/- per month till realisation. Suit was decreed and appellant was allowed recovery of possession of plaint schedule property. It was also provided that respondent is entitled to the value of improvements which is to be fixed at execution proceedings. Respondent did not file an appeal. Appellant filed A.S.12/1992 before the Sub court, Muvattupuzha challenging the portion of the decree granting value of improvements, to be fixed at the execution stage

contending that being a trespasser appellant is not entitled to the value of improvements. In the appeal respondent filed a cross objection contending that trial court should have found that respondent is not a trespasser and he has been in possession of the property from the date of Ext.A1 partition deed and appellant is not entitled to the decree for recovery of possession sought for. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff that appellant has title to the plaint schedule properties under Ext.A1. But it was found that as item No.1, appellant was allotted only 15 cents in survey No.68/11B and as item No.2, 20 cents on eastern side of 57 cents comprised in survey No.68/11C was also allotted to him and the remaining extent in that survey number, being the eastern part, was allotted to the respondent under B schedule and as item No.3 only 15 cents in R.S.No.68/11A was allotted to the appellant and those plots are plots 3,4 and 9 marked in Ext.C1(a) plan. Learned Sub Judge found that

appellant is only entitled to recovery of possession of the item No.3,4 and 9 and not the remaining 15 cents in survey No.68/11 A. Finding that respondent has planted 37 rubber trees bonafide, it was held that appellant is entitled to the value of improvements of only those 37 rubber trees. Decree was modified with regard to value of improvements restricting it to 37 rubber trees. Recovery of possession was also modified to plots 3,4 and 9. Appellant is challenging the judgment in the second appeal.

3. Appeal was admitted formulating following substantial questions of law.

1) Whether first appellate court was justified in varying the decree granted by trial court when respondent did not raise specific grounds in the cross objection with regard to possession of 30 cents in R.S.No.68/11A.

2) Whether first appellate court was justified in restricting the decree to 15 cents in

R.S.No.68/11A, when Ext.A1 partition deed shows that only appellant was allotted the property in R.S.No.68/11A and respondent was not allotted any property in that survey number.

4. Learned counsel appearing for appellant and respondent were heard.

5. Though respondent raised a contention before the trial court, and it was re-agitated before the first appellate court that properties which were divided under Ext.A1 was earlier divided and the respective positions of the parties were in the possession of the sharers, it was not accepted by the trial court and appellate court. Being a finding of fact, that question cannot be re-agitated in the second appeal. Fact that appellant was allotted the properties under schedule A and respondent under schedule B is also undisputed. Trial court and first appellate court found that appellant has title to the property allotted as schedule A under Ext.A1. Trial

court found that plaint schedule properties are the properties allotted to the appellant under Ext.A1 and he has title to the property. Learned Sub Judge on reappreciation of evidence also confirmed that finding. But learned Sub Judge modified the decree with respect to the eastern portion of R.S.No.68/11A having an extent of 15 cents, though trial court found that appellant has title to the entire thirty cents including the said 15 cents also. Argument of learned counsel appearing for appellant is that when the title so found by the trial court, was not specifically challenged in the cross objection and no specific ground was taken first appellate court was not justified in varying the decree and that too without a specific finding for the modification. It was argued that first appellate court restricted the relief to plot No.4 alone which is the western 15 cents plot in R.S.No.68/11 A, for the reason that commissioner has found that respondent is in possession of that property and not for the reason that appellant has no

title to the property. Learned counsel appearing for respondent argued that under Ext.A1 appellant was allotted only 15 cents and that 15 cents is plot No.4 and appellant cannot claim title to the eastern 15 cents in R.S.68/11A which is in the possession of respondent. and therefore finding of first appellate court is correct.

6. There is force in the submission of the learned counsel appearing for appellant that when the question of title with regard to the eastern half of R.S.No.68/11A which is part of 30 cents for which title of the appellant was upheld by the trial court and when the finding was not specifically challenged by respondent, first appellate court should not have varied the said finding. Grounds taken in the cross objection are as follows;

1. The lower court went wrong in finding that the respondent is a trespasser and as such he has to be evicted from the plaint schedule properties.

2. The lower court ought to have found that the respondent got possession of plaint schedule properties on the date of partition deed and that the respondent is legally entitled to be in possession of the properties as per the provision of the partition deed.

3. The lower court ought to have found that the plaintiff was never in possession of the plaint schedule properties from the date of partition.

Therefore in the light of the grounds taken in the cross objection, first appellate court was not justified in probing the title of the appellant further, when it was already found in his favour by the trial court.

7. Whatever it be, the question is whether appellant has title to the eastern 15 cents which was not granted by the first appellate court. It is not disputed that respondent was not allotted any property in R.S.No.68/11 A. It is also true that as item No.2

of A schedule, only 15 cents in R.S.No.68.11 A as allotted along with other properties to the appellant. That 15 cents is marked by the Commissioner as plot 4. But as rightly pointed out by the learned counsel appearing for appellant, description of item No.2 of A schedule in Ext.A1 shows that it is not only 15 cents but also the surplus areas ("virivu"). If that be so, it cannot be said that as extent of R.S.No.68/11 A shows only 15 cents, appellant has no title to the remaining 15 cents of the property. When Ext.A1 shows that respondent was not allotted any property in R.S.No.68/11 A and instead the entire property was allotted only to the appellant showing the extent of surplus land, it can only be found that appellant has title to said eastern 15 cents also. It is more so, because the description of item No.2 of A schedule of Ext.A1 shows that it is a continuous plot along with plots 3,4,9 and 10 as demarcated by the Commissioner. If that be so, even on merits first appellate court was not at all justified in restricting the decree to

plot No.4 alone and not confirming the decree granted in respect of the eastern 15 cents of R.S.No.68/11A. Therefore, to that extent appellant is entitled to succeed in the appeal. No other question was argued in the appeal. Though respondent had filed a cross objection, it does not show any substantial question of law. No substantial question of law is also involved. Hence cross objection is dismissed.

8. In the result, appeal is allowed. Judgment in O.S.201/1988 on the file of Munsiff court, Muvattupuzha as modified in A.S.12/1992 on the file of Sub court, Muvattupuzha is modified holding that appellant is also entitled to get recovery of possession of eastern 15 cents of plot No.4 in R.S.No.68/11A as demarcated by the Commissioner. No cost.

Sd/- M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.929 OF 1994

6th December 2007

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